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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JAMES PRENTISS COGHILL, Appellant.	2 CA-CR 2009-0247 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20042573

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

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E C K E R S T R O M, Judge.

¶1 Appellant James Coghill was retried after this court reversed his convictions and sentences in *State v. Coghill*, 216 Ariz. 578, 169 P.3d 942 (App. 2007). At the conclusion of the second trial, the jury found him guilty of a single count of attempted sexual exploitation of a minor under the age of fifteen and acquitted him of the remaining fourteen counts of sexual exploitation of a minor with which he had been charged. The trial court suspended the imposition of sentence and placed Coghill on ten years' probation. On appeal, he contends the court erred by admitting his statement that he possessed pornography; admitting expert testimony relating to handwriting analysis; and denying his request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). Finding no error, we affirm.

Factual and Procedural Background

¶2 Because much of the general background of this case has already been provided by our previous opinion, we state here only those additional facts necessary to resolve the issues Coghill raises in his present appeal. In so doing, we view the evidence in the light most favorable to upholding the jury's verdicts, *see State v. Windsor*, 224 Ariz. 103, ¶ 2, 227 P.3d 864, 864 (App. 2010), and draw all reasonable inferences from the evidence against the defendant. *State v. Long*, 207 Ariz. 140, ¶ 2, 83 P.3d 618, 620 (App. 2004). Coghill was convicted of count number fifteen of the indictment, which alleged he had attempted to transmit, possess, or exchange sexually explicit videos of children under fifteen that were contained in a digital file.

¶3 At trial, Pima County Sheriff's Deputy Jace Judd testified that when he went into Coghill's motor home and asked him about several stacks or "spindles" of

compact discs (CDs) visible near his computer, Coghill replied that they contained recordings of the "X[-]Files," the "Star Trek Trilogy," and "pornography." Of the nearly one hundred CDs on one of the spindles that Coghill had referred to, several CDs near the top of the stack had "KP" written on them with a marker. Most of the CDs marked "KP" contained content depicting the sexual exploitation of minors, and some of the CDs bore more descriptive handwritten labels such as "porn KP," "KP porn movies," and "KP porn movies unsorted." The trial court permitted the deputy to testify about Coghill's pornography statement over his objection, and the court later denied his motion for a mistrial based on the admission of this statement.

¶4 Alan Kreitl, a forensic document examiner employed by the Arizona Department of Public Safety, testified that although his analysis of the writing on the "KP" CDs was inconclusive, there were some features of the letters that suggested Coghill might have written them. Coghill had filed a pretrial motion to preclude Kreitl from testifying as an expert witness, but the trial court denied the motion, finding that Kreitl was properly qualified under the rules of evidence. At trial, Kreitl testified he had served as an apprentice with a senior document examiner for two years, attended various training courses, and worked as a document examiner primarily doing handwriting comparisons for the past eleven years.

¶5 Later in the trial, the court denied Coghill's request for a *Willits* jury instruction based on law enforcement officers' failure to properly secure evidence in his mobile home. The jury then found him guilty of the single count noted above, and the trial court granted leave to file this delayed appeal following his disposition.

Discussion

Pornography Statement

¶6 Coghill first argues the trial court erred in admitting his statement to the sheriff's deputy that the stack of CDs in his motor home contained "pornography." He maintains that because he had denied possessing child pornography, his statement led the jury to infer that he possessed adult pornography. And this, he concludes, violated Rule 404(b), Ariz. R. Evid., as well as our previous decision.

¶7 In our prior decision, we held that evidence generally showing Coghill possessed legal adult pornography was inadmissible under Rules 402 and 404(b), Ariz. R. Evid. *Coghill*, 216 Ariz. 578, ¶¶ 22-23, 27, 169 P.3d at 948, 949. Here, however, the trial court ruled Coghill's particular statement to the deputy was admissible because it was relevant and showed his possible knowledge of the CDs that depicted the sexual exploitation of minors.

¶8 We agree with the trial court and the state that Coghill's statement did not constitute impermissible other-act evidence. As Coghill acknowledges, his statement could reasonably be construed as direct evidence of his guilt, showing he knew the stack of CDs in question contained some form of pornography. Although far from a confession to possessing child pornography, the jury could infer from the statement that if Coghill knew the contents of the stack of CDs generally, he also may have known of their specific contents. Thus, the trial court did not abuse its discretion or violate the law of the case by admitting the challenged statement. *See State v. LeBrun*, 222 Ariz. 183, ¶ 5,

213 P.3d 332, 334 (App. 2009) (ruling on admissibility of evidence reviewed for abuse of discretion).

Handwriting Analysis

¶9 As he argued below, Coghill contends the trial court "should have excluded testimony by the forensic document examiner, Mr. Kreitl, that he believed it was slightly more likely than chance that . . . Coghill wrote the label on the KP discs because [Kreitl] was not qualified, . . . he did not follow accepted procedures, and . . . handwriting identification is . . . junk science." We review a trial court's decision whether to admit the testimony of a handwriting expert for an abuse of discretion. *See State v. Livanos*, 151 Ariz. 13, 15, 725 P.2d 505, 507 (App. 1986); *see also State v. Villalobos*, 225 Ariz. 74, ¶ 25, 235 P.3d 227, 234 (2010). We find no abuse of discretion here.

¶10 Preliminarily, we note that our supreme court has routinely relied upon testimony from experts in the field of comparative handwriting analysis when affirming criminal convictions. *E.g., State v. Mathers*, 165 Ariz. 64, 71, 796 P.2d 866, 873 (1990) (concluding sufficient evidence supported convictions of codefendants based, in part, on testimony of handwriting analysis expert); *State v. Sianez*, 103 Ariz. 616, 617, 620, 447 P.2d 874, 875, 878 (1968) (finding substantial evidence supported forgery conviction based, in part, on handwriting expert's testimony that defendant wrote on stolen money orders). And our supreme court has implicitly approved of the use of handwriting experts in criminal cases for the bulk of our state's history. *See Pinal County v. Nichols*, 20 Ariz. 243, 245-47, 249, 179 P. 650, 650-51, 652 (1919) (holding county attorney authorized to compensate handwriting expert as charge to county when expert's services necessary).

As an intermediate appellate court, we are not in a position to agree with Coghill's contention that expert testimony relating to handwriting analysis should be broadly inadmissible.[1]

¶11 We turn then to the examiner's qualifications. Rule 702, Ariz. R. Evid., defines an expert witness as someone who has "specialized knowledge" that will assist the jury in understanding the evidence or deciding a fact in the case and who is "qualified . . . by knowledge, skill, experience, training, or education."[2] "The test of whether a person is an expert is whether a jury can receive help on a particular subject from the witness. The degree of qualification goes to the weight given the testimony, not its admissibility." *State v. Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004) (citation omitted).

¶12 Kreitl testified that he had received extensive training in forensic document examination and had worked in the profession for more than ten years. Because his training and experiences in analyzing handwriting were "significantly more extensive

[1]For similar reasons, we reject Coghill's suggestion that comparative handwriting analysis is a novel field that requires a hearing to be held pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *See Logerquist v. McVey*, 196 Ariz. 470, ¶ 62, 1 P.3d 113, 133 (2000) ("*Frye* is applicable when an expert witness reaches a conclusion by deduction from the application of novel scientific principles, formulae, or procedures developed by others."); *State v. Richards*, 166 Ariz. 576, 578, 804 P.2d 109, 111 (App. 1990) (observing "[t]he presentation of comparative evidence by a qualified expert without a *Frye* hearing is commonplace in criminal trials").

[2]Section 12-2203, A.R.S., a statute relating to the admission of expert testimony, was not in effect when Coghill was convicted. We therefore do not address this statute or its constitutionality. *See Lear v. Fields*, 599 Ariz. Adv. Rep. 37, ¶ 1 (Ct. App. Jan. 12, 2011) (finding § 12-2203 unconstitutionally usurps supreme court's rule-making authority and violates separation of powers doctrine).

than the average person['s]," *id.* ¶ 75, the trial court did not abuse its discretion in determining Kreitl was a qualified expert whose testimony could potentially assist the jury. Nor did the court err in concluding that Coghill's complaints about Kreitl's analysis went to the weight of his testimony rather than its admissibility. *Cf. State v. Morgan*, 204 Ariz. 166, ¶ 33, 61 P.3d 460, 468 (App. 2002) (concluding disagreement between deoxyribonucleic acid (DNA) experts affected credibility of testimony rather than admissibility). Accordingly, we find no error in the trial court's ruling.

Willits Instruction

¶13 Coghill also contends the trial court erred in denying his request for a *Willits* instruction because law enforcement officers allowed his occasional roommate and primary accuser, Jacob Franks, to remove his own CDs from Coghill's mobile home. As he argued below, Coghill contends on appeal the "burn dates" on those CDs could have supported his defense that Franks was the person who downloaded and copied the child pornography to discs found in Coghill's mobile home because Franks's CDs might have revealed when and how he had used Coghill's computer. The trial court denied the requested instruction on several grounds, including the ground that it was "purely speculative" whether "some of those CDs might have been burned on Mr. Coghill's computer." We review the court's ruling for a clear abuse of discretion. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶14 A defendant is entitled to a *Willits* instruction, which permits the jury to draw a negative inference against the state, when "'(1) the state failed to preserve material and reasonably accessible evidence that had a tendency to exonerate the accused,

and (2) there was resulting prejudice.'" *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988), *quoting State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985). By this standard, a defendant need not establish with certainty that the lost evidence was exculpatory. *See State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993) (noting instruction required if state "failed to preserve material evidence that *might* aid the defendant"). A defendant nevertheless bears the burden of establishing that the evidence tended to exonerate him. *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999); *State v. Dunlap*, 187 Ariz. 441, 463-64, 930 P.2d 518, 540-41 (App. 1996). His mere speculation on this point is insufficient to support an instruction. *See, e.g.*, *Dunlap*, 187 Ariz. at 464, 930 P.2d at 541 (affirming ruling when specific content of files unknown and "claim that the destroyed or lost files would have supported [defendant's] theory of the case entitling him to a *Willits* instruction is entirely speculative"); *see also State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988) ("A *Willits* instruction must be predicated on a theory supported by the evidence . . . .").

¶15 In his opening brief, Coghill correctly points out that Franks testified he brought both commercially produced music CDs and his own "burned" music CDs with him when he came to live with Coghill in Tucson. Yet Coghill fails to address the trial court's finding that the exculpatory nature of these CDs was too speculative to warrant a *Willits* instruction given that there was no indication the CDs were created on Coghill's computer. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (requiring appellant to develop argument and provide citation to record for each contention raised in opening brief); *see also State v. Larson*, 222 Ariz. 341, ¶ 23, 214 P.3d 429, 434 (App. 2009) (arguments first raised in

reply brief deemed waived); *State v. Aleman*, 210 Ariz. 232, ¶¶ 8-10, 109 P.3d 571, 575 (App. 2005) (failure to address alternative grounds for ruling in opening brief may result in waiver). Because he has failed to demonstrate the trial court abused its discretion in denying the requested instruction, we find no basis to disturb its ruling.

¶16 Moreover, even if Coghill had established his theory that Franks's CDs tended to exonerate him, he has not been prejudiced by the court's failure to give a *Willits* instruction. *See Reffitt*, 145 Ariz. at 462, 702 P.2d at 691 (affirming conviction when appellate court "detect[ed] no reasonable possibility that the assigned error contributed to the jury's verdict"). The denial of a *Willits* instruction does not prevent a defendant "from arguing the substance of th[e] instruction to the jury." *Perez*, 141 Ariz. at 464 n.6, 687 P.2d at 1219 n.6. Here, Coghill established through the testimony of a sheriff's detective that law enforcement officers should not have allowed Franks to take the items from the scene without first examining them. In his closing argument, Coghill then posed the following question to the jury: "[W]hat w[as] on those CDs that Jake Franks had that he was able to walk out with?" He went on to argue that the absence of this potentially significant evidence, considered in light of the state's burden of proof and the presumption of innocence, should lead jurors to find Coghill not guilty. In this context, any error in denying the requested instruction was harmless beyond a reasonable doubt. *See Reffitt*, 145 Ariz. at 462, 702 P.2d at 691.

Disposition

¶17 For the foregoing reasons, Coghill's conviction and disposition are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge